

2020 Executive Power Survey of Presidential Candidates

Thank you for participating in this fourth quadrennial survey of presidential primary candidates about their understanding of the scope and limits of the executive powers they would wield if elected. Our intent is to publish your responses, in full, alongside the answers of the other serious candidates, later this year. Please also do not hesitate ask a campaign aide to contact me if one of the inquiries below is unclear or if you have any other questions.

– Charlie Savage, [REDACTED] com, 202-[REDACTED]

1. PRESIDENTIAL WAR POWERS

In recent years, the Justice Department's Office of Legal Counsel has claimed that the Constitution authorizes the president, as commander-in-chief, to order the military to attack other countries without congressional permission if the president determines that this would be anticipatory self-defense or otherwise serve the interests of the United States – at least where the nature, scope and duration of the anticipated hostilities are "limited," like airstrikes against Libyan government forces in 2011 and Syrian government forces in 2017 and 2018.

Do you agree with the O.L.C.'s reasoning? Under what circumstances other than a literally imminent threat to the United States, if any, does the Constitution permit a president to order an attack on another country without prior Congressional authorization? What about bombing Iranian or North Korean nuclear facilities?

2. MILITARY FORCE AGAINST AMERICANS

After 9/11, an American citizen, who had been arrested in Chicago and accused of terrorism links, was deemed to be an "enemy combatant" and transferred to military custody, where he was held in wartime detention without trial for years before being transferred back to the civilian justice system before the Supreme Court could resolve his case. In 2011, an American drone strike targeted and killed an American citizen who had been deemed to be an operational terrorist leader whose capture was infeasible, but who had not been charged or convicted in a trial. In 2019, the executive branch was reported to be considering invoking the Insurrection Act to deploy military forces on domestic soil to enforce immigration laws.

Are any of these examples unlawful? Under what circumstances, if any, may a president use military force within the United States or against Americans?

3. COMMANDER-IN-CHIEF POWER

After 9/11, the NSA wiretapped on domestic soil without court orders seemingly required by the Foreign Intelligence Surveillance Act, and the CIA used coercive interrogation techniques on prisoners despite anti-torture laws and treaties. In the 2014 Bergdahl deal, the military transferred five Guantanamo detainees to Qatar without giving Congress the 30 days notice seemingly required by a detainee transfer law. In each instance, executive branch lawyers said the apparent legal barriers were unconstitutional encroachments on commander-in-chief power.

Were any of these actions unlawful? Under what circumstances, if any, do you believe the Constitution empowers the president, as commander-in-chief, to override or bypass prohibitions or requirements in federal statutes?

4. PRESIDENTIAL SIGNING STATEMENTS

In recent decades, presidents have started to routinely use “signing statements” to claim a constitutional right to bypass provisions of bills they are signing into law. The American Bar Association has called the practice unconstitutional and said presidents can choose only between vetoing bills, giving Congress an opportunity to override their judgments, or signing and obeying all of them. Other legal specialists have disagreed, saying the practice is appropriate so long as the theories of executive power used to challenge provisions are legitimate.

Under what circumstances, if any, would you use signing statements to deem provisions of bills constitutionally invalid?

5. PRESIDENTIAL OBSTRUCTION OF JUSTICE

Before becoming attorney general, William Barr took the position that obstruction of justice laws should not be interpreted as applying to a president who abuses his official powers to impede an investigation for corrupt reasons – and that, as a constitutional matter, Congress could not criminalize abuse of official power even if lawmakers explicitly intended to do so.

As a constitutional matter, does Congress have the authority to criminalize a president’s abuse of Article II powers for corrupt purposes? As a statutory matter, do current obstruction-of-justice laws apply to a president’s abuse of his official powers?

6. PRESIDENTIAL INDICTABILITY

The Justice Department's Office of Legal Counsel – first under the Nixon administration during the Watergate scandal, and then under then Clinton administration during the Whitewater/Lewinsky scandal – has asserted that sitting presidents are immune from criminal indictment and trial and so any such criminal process has to come after they leave office, a view that bound Special Counsel Robert Mueller.

Is this the correct interpretation of the Constitution? If not, would you instruct your attorney general to rescind those O.L.C. opinions? If so, would you sign legislation tolling the statute of limitations for any criminal offenses by presidents so that it does not run while they are in office?

7. EXECUTIVE SECRECY

Presidents of both parties have claimed that executive privilege applies not only to their own internal White House communications, but also to internal deliberations within government department and agencies that do not involve the president. The Trump legal team has further argued that congressional subpoenas whose primary goal is to uncover potential wrongdoing, rather than to inform bill writing, are invalid because they lack a legitimate legislative purpose.

Does executive privilege extend to agency deliberations that did not involve the White House? Does Congress have legitimate constitutional authority to issue subpoenas compelling disclosure of information about potential wrongdoing?

8. PRESS FREEDOMS

Prosecutors recently expanded a criminal case against Julian Assange to include accusations that he violated the Espionage Act by soliciting, obtaining, and publishing classified documents leaked in 2010 by Chelsea Manning, which could establish a precedent that such common journalistic activities (a separate question from whether Assange counts as a "journalist") can be treated as a crime in America.

Are these charges constitutional? Would your administration continue the Espionage Act part of the case against Assange?

9. POTENTIAL POST-TRUMP REFORMS

Many recent disputes have raised the prospect that Congress, in a post-Trump era, will seek to tighten legal limits on executive power to enforce previous norms of presidential behavior. What sorts of new

legal restrictions on presidential authority, if any, would you view as constitutional and be inclined to sign into law on these topics?

- **The ability of a president to declare a national emergency and activate various standby powers, and to invoke national-security exceptions to various legal prohibitions**
- **The ability of a president to order the removal of a special prosecutor appointed to scrutinize potential high-level executive branch wrongdoing**
- **The ability of a president or presidential candidate to choose not to make public his or her tax returns**
- **The ability of a president or presidential candidate to accept non-financial assistance from a foreign government in an election**
- **The ability of a president to choose not to divest from significant business holdings or place them into a blind trust, and to engage in business transactions with foreign governments while in office**
- **The ability of a president to hire close family members for White House positions**
- **The ability of a president to intervene in Justice Department law enforcement actions, including in matters like antitrust and directing the opening or closing of investigations into political allies or opponents**
- **The ability of a president to override recommended denials of security clearances**
- **The ability of a president to use the Federal Vacancies Reform Act to install someone as acting agency or department head who was not in the normal order of succession for that position**
- **The application of the Freedom of Information Act requests to White House records, which are currently exempt**
- **The ability of a president to pardon or dangle a potential pardon at someone in a self-protective context – such as an investigation in which the president, one of his family members, or a campaign or close business associate is a target, subject, or witness – without disclosing to Congress communications and materials about the pardon, including evidence against the recipient**

10. WRAPPING UP

- **Legal Advisers: Who are your campaign's advisers for legal issues?**
- **Candor about Executive Power: Do you think it is important in the American system of democracy for would-be presidents to answer questions like these before voters decide whom to entrust with the office? What should voters conclude about any of your rivals who are unwilling or unable to answer them?**